In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 624

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP, PETITIONER

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.

No. 661 Misc.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP, PETITIONER

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A WRIT OF MANDAMUS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review, by either mandamus or certiorari, of the order of the Court of Appeals for

the First Circuit dismissing his appeal for want of diligent prosecution. Petitioner's brief and record appendix were due for filing in the court of appeals on March 22, 1967. On February 24, 1967, the court denied petitioner's motion for a 30-day extension of briefing time, which appellees had opposed. On February 27, 1967, appellees moved to dismiss the appeal on the basis of petitioner's failure to file and serve its designation of the record to be printed and the points to be relied on within the required time. The court denied the motion and extended this deadline. Then, on March 21, 1967—the day before its brief was due—petitioner filed a motion to extend its briefing time to March 31. The court denied this motion and, on March 29, 1967, dismissed the appeal for want of diligent prosecution. On April 12, petitioner filed a petition for rehearing and, two days later, a page proof of an incomplete draft of its proposed brief. On April 18, 1967, the court denied the petition for rehearing. Five months later, on September 15, 1967, the present petitions were filed in this Court.

The court of appeals acted within its authority and did not abuse its discretion in dismissing the appeal. This is not an appropriate situation for the issuance of a writ of mandamus by this Court. See, *e.g.*, *Ex parte Fahey*, 332 U.S. 258; Rule 30, Supreme Court Rules. Nor does petitioner present any question of importance warranting review under this Court's certiorari jurisdiction. Furthermore, the action of the court below was clearly warranted by the facts.

Several weeks before petitioner's brief was due, appellees had opposed an extension of briefing time, and had moved to dismiss for petitioner's failure to meet another deadline. Thus petitioner was on notice that appellees considered expeditious handling of the appeal to be vital. That the court of appeals agreed was made plain by its denial of petitioner's first motion for an extension. Moreover, the circumstances of the case made it plain to all that speed was essential.

This case involves the reorganization of the Boston & Providence Railroad, which is now being operated by the New York, New Haven & Hartford Railroad Company.[1] The success of the plan hinges on the ability of New Haven to make certain payments. New Haven is presently operating at a loss, and undue prolongation of the litigation may impair its ability to make the payments required by the plan. In its opinion upholding the reorganization plan, which had previously been approved by the Interstate Commerce Commission, the district court explained:

> After the 1954 plan had been approved by this court and the Court of Appeals, the time lapse caused by subsequent delaying proceedings initiated by the Development Group was so long that eventually the New Haven was no longer in a financial position to make the payments required of it and the plan became unfeasible. Today, the financial position of the New Haven

[1] The interest of the United States in the proceeding stems from its position as creditor of New Haven, holding a pledge of debentures of Boston & Providence.

> is such that undue prolongation of litigation over this plan may produce a similar result. * * *

In re Boston & Providence R.R. Corp., 260 F. Supp. 415, 421 (D. Mass.).

Only last Term this Court, in dismissing an appeal because of a docketing delay, observed that "if there are to be rules, there must be some limit to our willingness to overlook their violation." *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U.S. 32.[2] And since delay in this case could cause substantial injury to the railroad and its creditors, the court of appeals correctly observed that "if someone must suffer because of dereliction of counsel it is more appropriate that it be his own client than the other side" (Pet. App. 5a). The validity of the reasons now proffered to excuse petitioner's counsel's failure to meet his deadlines does not present any question warranting review by this Court.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

OCTOBER 1967.

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[2] Indeed, this Court has repeatedly upheld a lower federal court's refusal to hear a case when that court's time limits have not been complied with. *E.g., Link* v. *Wabash R.R. Co.*, 370 U.S. 626; *Lord* v. *Helmandollar*, 348 F. 2d 780 (C.A.D.C.), certiorari denied, 383 U.S. 928; *Beaufort Concrete Co.* v. *Atlantic States Construction Co.*, 352 F. 2d 460 (C.A. 5), certiorari denied, 384 U.S. 1004.

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